NO. 48960-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERMAINE L. GORE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-02681-1

Brief of Respondent

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2. Where a firearm was discovered next to packages of drugs in a vehicle console at the defendant's fingertips, did the State adduce sufficient evidence that the defendant was armed with a firearm?

3. Where the defendant failed to object to use of a jigsaw puzzle analogy in closing argument, did he waive the issue on appeal?

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5. If the State prevails in this appeal, and if it submits a cost bill, should the Court exercise discretion in ruling on costs?

B. STATEMENT OF THE CASE.

1. Procedure

On July 9, 2015, the Pierce County Prosecuting Attorney (State) charged the defendant, Jermaine Gore, with Unlawful Possession of a Firearm in the first degree (UPF1), and two counts of Unlawful Possession of a Controlled Substance (UPCS). CP 1-2. The UPCS counts included firearm sentence enhancements (FASE). The defendant filed a motion to suppress the evidence (CP 3-16) and a motion to dismiss (CP 17-21). As

the case progressed, the defendant filed a second motion to suppress evidence. CP 71-77. His motion was supported by a legal memorandum. CP 86-91.

The motions were assigned to Hon. Edmund Murphy for determination. 2/2/2016 RP. The court heard testimony and argument regarding suppression of the evidence, pursuant to CrR 3.6. 2/25/2016 RP[1]. Judge Murphy denied the motions to suppress. 2/29/2016 RP 191, CP 103-108.

The case proceeded to trial. The case was assigned to Hon. James Orlando for trial. 1 RP 2. Before the jury heard evidence, the court considered several pretrial motions. 1 RP 2. The State amended the Information to charge UPF1, two counts of UPCS with intent to deliver (with FASE) and one count of rendering criminal assistance in the first degree (with FASE). CP122-124.

After hearing all the evidence, the jury found the defendant guilty as charged of UPF1, two counts of UPCS with intent to deliver, and rendering criminal assistance. CP 284, 285, 289, 292. The jury also found FASE on the three counts where it was alleged. CP 286, 290, 293.

On May 6, 2016, the court sentenced the defendant to a total of 308 months in prison. CP 377. This included the three FASEs. *Id.* The defendant filed a timely notice of appeal on the same day. CP 385.

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[1] The State will refer to the VRPs as they are labeled by the court reporter. Pre-trial matters are by date; trial is by volume. Appellant used a somewhat different system.

2. Facts

In the first week of May, 2015, Tacoma Police were investigating a gang-related drive-by shooting and homicide which occurred near the Tacoma Mall. 3 RP 104-105. A few days later, police learned that one of the primary suspects, Alexander Kitt, was required to be at a drug-treatment agency, Pierce County Alliance (PCA), on May 5 to leave a urine sample. 3 RP 122. Police organized surveillance to try to arrest Kitt at that time. 3 RP 123.

On May 5, 2015, police were in position near and inside PCA to arrest Kitt. Detectives with the Violent Crimes Task Force requested the assistance of marked or uniformed police officers to assist them. 4 RP 258. Two uniformed officers contacted the occupants of a two-toned Cadillac DeVille. 4 RP 262. The car had been seen bringing Kitt to PCA, and was waiting nearby. 3 RP 124.

The two officers contacting the DeVille found the defendant in the driver seat, 4 RP 266, 307. The defendant's son, Jermohnn Gore, was seated behind him. 4 RP 307. Ladell Moton was also in the back seat, on the passenger side. 4 RP 267. Jermohnn and Moton were later arrested for unrelated reasons. 4 RP 310, 316. Moton was armed with a 9mm pistol in his waistband. 4 RP 317.

Numerous law-enforcement agents and detectives were present around the DeVille. 4 RP 312. The defendant was cooperative. 4 RP 331.

He was not wanted in connection with the shooting the police were investigating. 4 RP 311, 314. Police impounded the car for a search warrant. 3 RP 127.

When police served the search warrant on the car, they discovered drugs and firearms. Police found a black bag beneath the front passenger seat. 4 RP 350. The bag contained two guns; a Springfield Armory .40 caliber pistol, and a Taurus .38 special revolver. 4 RP 353-354. The bag also contained a cloth bag containing packages of suspected drugs. 4 RP 352. On the rear passenger floor behind the driver was a nylon guitar case. 4 RP 355. It contained a 7.62 mm assault rifle with a drum magazine loaded with 61 rounds. 4 RP 355-356.

Police found a Samsung mobile telephone on the driver seat. 4 RP 357. They discovered a package of rock cocaine between the driver seat and the center console. 4 RP 358, 400. Inside the center console, police found a cloth bag containing two small packages of methamphetamine and marijuana. 4 RP 407-408. Beneath that cloth bag was a Charter Arms .38 special revolver, loaded with five rounds. 4 RP 363-364. Mail addressed to the defendant was discovered beneath the gun. 4 RP 403-406. A box of .38 special ammunition was discovered in the trunk. 4 RP 372.

C. ARGUMENT.

1. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL AND RESULTING PREJUDICE.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *See*, ***Strickland v. Washington***, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.*, at 684. In ***Strickland***, the Supreme Court summarized:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id., at 686.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland***, at 687; ***State v. Thomas***, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). "Surmounting Strickland's high bar is never an easy task." ***Padilla v. Kentucky***, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong

presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–35. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); ***McFarland***, 127 Wn.2d at 336. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. ***Strickland***, 466 U.S. at 690.

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. ***McFarland***, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." ***Strickland***, 466 U.S. at 695.

The defendant faults trial counsel for agreeing to the search of the defendant's mobile or cellular telephone. App. Br. at 14-15. The phone was in the car, which police seized and searched pursuant to a warrant. Police had possession of the phone.

Defense counsel's decision regarding the phone was tactical. Defense counsel was in a difficult position regarding the contents of the phone. The defendant was charged with possessing drugs with intent to deliver and rendering criminal assistance in a murder. Defense counsel knew the phone may have information helpful to a defense of alibi,

unwitting possession, or the level of the defendant's participation or whether he participated at all. On the other hand, counsel likely knew that the phone could contain incriminating information.

The police had the phone. Defense counsel could not find out what information was on the phone without examining it. Police were not going to give the phone back to the defendant without "dumping", or making a copy of all the information on it first. Police could have obtained a second or extended warrant to search the defendant's phone, thereby obtaining the same evidence. Defense counsel made a tactical decision to obtain the contents of the cell phone. It was not defense counsel's "fault" that the evidence on the defendant's phone was discovered. This is not deficient performance.

Nor can the defendant show prejudice. Police were going to search the phone whether the defense agreed to it or not. Contents of a suspected drug dealer's cell phone are often used to prove intent to deliver. Likewise, where the defendant was charged with aiding the shooter or shooters after the murder, police were going to examine the phone to see if there had been any communications between the defendant and the persons he was charged with helping.

Last, but not least, the defendant himself agreed to permit the police to copy the data on his cell phone. Paragraph 2 of the order states in part that "the State, through the Tacoma Police Department, shall make a digital copy of the cell phone data for MC 70 that is subject to

examination by the State." CP 397. The defendant signed this order as "Approved". CP 399. He should not now be heard to complain of it, nor cast aspersions on his trial counsel, for the discovery of this information.

The reviewing court considers defense counsel's performance in the context of the entire record, not just the issue the defendant raises on appeal. This defendant fails to credit trial counsel for the counsel's efforts and work in this case. Counsel filed two suppression motions and a motion to dismiss. He vigorously challenged the evidence and argued the defendant's case before the court.

After the unsuccessful suppression motion, counsel made the best of reality. The defendant was driving a car where guns and drugs were at the fingertips or at the feet of every occupant. A gun and a bag of drugs were resting atop the defendant's mail in the center console. Despite this, defense counsel elicited testimony that the defendant's fingerprints were not on any of the guns. 3 RP 142. There was no connection between the defendant's car and the fatal drive-by shooting. 3 RP 143.

Defense counsel elicited testimony that many of the text messages were invitations to *use* drugs, specifically marijuana or methamphetamine which were found in the center console. 3 RP 233-235. He got Det. Martin to admit that the detective could not conclude whether the defendant was a user or a dealer. 3 RP 245.

He pointed out that the defendant was cooperative. 4 RP 286, 33. Counsel elicited that the defendant acted lawfully and was friendly with the police. 4 RP 331-332.

Counsel elicited that the place where one package of drugs was found, between the driver seat and the console, could be reached from the back seat. 4 RP 391. Counsel got Det. Hoisington to admit that it looked like the small package of drugs had been dropped, and not stuffed, between the seat and console. 4 RP 413. The drug package next to the seat was similar to the one found in passenger Moton's pocket. 4 RP 287.

All this could be used to argue that most of the drugs and gun belonged to others in the car. The testimony also permitted the argument for a lesser charge of mere possession of drugs, where the firearm enhancement would be less likely.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE DEFENDANT WAS ARMED WITH A FIREARM.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***State v. Salinas***, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992); *see also* ***State v. Kintz***, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The presence of contrary or countervailing evidence is irrelevant to a sufficiency-of-the-evidence challenge because the evidence is viewed in the light most favorable to the State. ***State v. Ibarra–Cisneros***, 172 Wn.2d 880, 896, 263 P.3d 591 (2011).

Here, the jury was correctly instructed that "A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use." Instruction 30, CP 279. *See* WPIC 2.10.01; ***State v. Schelin***, 147 Wn. 2d 562, 567, 55 P. 3d 632 (2002); ***State v. Valdobinos***, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Instruction 30 also told the jury that the State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant and between the firearm and the crime. CP 279. The jury was allowed to consider, among other factors, "the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon". *Id.*

A .38 caliber revolver was found, with some of the drugs, in the center console immediately next to or below the defendant's right hand. This gun was in addition to the assault rifle directly behind his seat and the .40 caliber pistol and a second .38 caliber revolver under the front passenger seat. The handguns were found right next to bags of drugs. Detective Jeff Martin explained why drug dealers often carry guns to protect themselves. He testified that drug trafficking and sales is a dangerous and violent business. 3 RP 218. He told the jury that drug dealers become targets for robbery. 3 RP 219.

By challenging the sufficiency of the evidence, the defendant admits all of the above is true. He agrees that all of the logical inferences are drawn against him. The relevant time period when the defendant is armed is while he is committing the crime, not after he has been arrested or detained by the police. Under the facts of the present case, the jury could easily conclude beyond a reasonable doubt that the defendant was a drug dealer who kept a gun by his side in order to protect himself from being robbed or assaulted. Likewise, regarding the rendering criminal assistance charge, the jury heard testimony describing the circumstances of the gang-related shooting. The jury could conclude that the defendant was armed with a firearm to protect himself against gang retaliation for the shooting.

3. THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT WAS PROPER.

The defendant bears the burden of showing that the comments in closing argument were improper and prejudicial. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). At trial, defense counsel has a duty to object to improper remarks and to seek a remedy from the court. *See* ***State v. Emery***, 174 Wn.2d 741, 761-762, 278 P.3d 653 (2012). If the defendant fails to object, he waives the issue of misconduct unless the comments are so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The defendant must show that the prejudice had a substantial likelihood of affecting the verdict. ***Emery***, 174 Wn.2d at 760-761. A prosecutor's comments during closing argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

The jigsaw puzzle analogy has been used by attorneys, and discussed by appellate courts, for several years. *See* ***State v. Lindsay***, 180 Wn. 2d 423, 435-436, 326 P. 3d 125 (2014); ***State v. Fuller***, 169 Wn. App. 797, 282 P.3d 126 (2012). As the Court pointed out in ***Lindsay***, the jigsaw puzzle analogy may be properly used to discuss how different and many pieces of evidence come together in a trial for the jury to consider

and what the overall "picture" that evidence shows, despite some missing "pieces". 180 Wn. 2d at 435, citing and discussing ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011). The analogy cannot be used to quantify the number or percent of the "pieces" are enough to meet the beyond a reasonable doubt standard. ***Lindsay***, 180 Wn. 2d at 436; citing and discussing ***State v. Johnson***, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

Here, the prosecutor used the jigsaw puzzle analogy correctly. He compared how the jury would consider the evidence; that despite some pieces that did not fit, or pieces that they might think exist, but was not present to consider. 6 RP 612. He did not speculate or quantify the amount necessary as the prosecutors in ***Lindsay*** and ***Johnson*** did. This prosecutor even acknowledged that each juror had to come to their own conclusion of how much evidence or "pieces of the puzzle" were enough to be convinced of the whole "picture" beyond a reasonable doubt. *Id.*

The prosecutor concluded his jigsaw puzzle analogy by specifically relating the analogy to evidence in a trial:

> Now, think about a trial much the same way, because a trial is about pieces of evidence that are intended to be put together in such a way that leaves you convinced beyond a reasonable doubt that someone committed a crime. You can reach that point, even though there are pieces of evidence that are conceivable that you never heard about. They were gone before you even deliberated. You may reach that point, even though you have pieces of

> evidence that you don't know what to do with, so you set them aside. You may reach that point where you're convinced beyond a reasonable doubt that the defendant is guilty of a crime, even though there are still some holes in one aspect or another.
>
> The point is when you look at all of the evidence and all the pieces of evidence, in the big picture sense are you convinced beyond a reasonable doubt the defendant is guilty. So I offer that as an analogy for you when you're thinking about the concept of proof beyond a reasonable doubt.

6 RP 612-613. This was an apt analogy in this trial where the defense pointed out evidence that was not present. Defense counsel carefully elicited that no fingerprints were found on the gun or the packages of drugs. 3 RP 141-142. Counsel made sure the jury heard that police requested DNA examination on the gun found in the console, but the crime laboratory declined the request. 3 RP 139, 141.

Because of the defense strategy and argument, the prosecutor returned to the jigsaw puzzle analogy in rebuttal:

> I mentioned to you the analogy about a puzzle, and you sit down to do a puzzle and certain pieces are missing before you even begin. Same concept with this DNA. You never heard about DNA. It's a puzzle piece that's missing, but the question for you is whether with that missing piece the other evidence you have still paints a picture beyond a reasonable doubt of the defendant's guilt.

6 RP 687.

Defense counsel did not object to any of these arguments, although he did object to other parts of the prosecutor's argument. *See* 6 RP 614, 689, 693. He even moved for a mistrial based upon a different part of the prosecutor's argument. 6 RP 697-698.

The absence of an objection to the remarks to which error has been assigned here suggests that defense counsel saw nothing wrong with them or that they were not prejudicial. *See* ***State v. Swan***, 114 Wn. 2d 613, 790 P. 2d 610 (1990). Indeed, as argued above, the argument was proper. The defendant waived the issue because he failed to object. He does not show that these remarks are improper, let alone flagrantly so.

4. IF THE STATE PREVAILS ON APPEAL AND SUBMITS A COST BILL, THE COURT WILL EXERCISE ITS DISCRETION IN DECIDING WHETHER TO AWARD COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Sinclair***, 192 Wn. App. 380, 367 P. 3d 612 (2016).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to

pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.73.160 was enacted in 1995. The Legislature has amended the statute somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, *see e.g.* ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015), the Legislature has yet to show any sympathy.

In exercising its discretion, the Court of Appeals will consider the circumstances of the case and the defendant. He was convicted of four felonies, three with FASEs. He was sentenced to 308 months in prison. The record reflected that the defendant is a career criminal who has spent little or no time gainfully employed. He has 14 prior felony convictions for which he likely has outstanding debts for previously imposed legal financial obligations. *See* CP 373. The trial court chose to impose only the mandatory legal financial obligations and then found him indigent for the appeal. 7 RP 735, 736.

If the State prevails in this appeal, it will remain to be seen if the State will submit a cost bill. The State will have to consider the new burden of proof imposed by recent amendments to RAP 14.2. Cost bills regarding defendants such as Mr. Gore who choose life of criminal

indolence are likely an exercise in futility. However, to do otherwise flies in the face of the will of the Legislature, and fairness to persons who come by their poverty honestly, or with an otherwise productive life of employment, choose to appeal their sole felony conviction.

D. CONCLUSION.

The defendant was represented at trial by very able counsel who tried to make the best of the criminal circumstances the defendant found himself in. There was more than enough evidence for the jury to find that the defendant was armed with a firearm during the commission of the crimes charged. The defendant failed to object to the use of the jigsaw puzzle analogy in argument likely because the use here was proper.

The State respectfully requests that the judgment be affirmed.

DATED: February 16, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2.16.17 Teresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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